

ELIZABETH RITTER

ATTORNEY AT LAW

ORIGINAL

8600 S.W. 92ND STREET
SUITE 104
MIAMI, FL 33156

FL BAR No. 0800104
PH. (305) 893-6344

DOCKET FILE COPY ORIGINAL

December 1, 2006

FILED/ACCEPTED

VIA HAND DELIVERY

DEC - 1 2006

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

Re: Petition for Reconsideration of Port Norris Radio
Amendment of Section 73.202(b)
FM Table of Allotments
FM Broadcast Stations ((Port Norris, New Jersey, Fruitland and
Willards, Maryland, Chester, Lakeside, and Warsaw, Virginia))
MB Docket No. 04-409

Dear Ms. Dortch:

Transmitted herewith on behalf of Port Norris Radio are an original and four copies of its
Petition for Reconsideration with respect to the above-referenced rule making proceeding.

If there are any questions concerning this submission, please contact the undersigned
directly.

Sincerely,



M. Elizabeth Ritter

Enclosures

04-409
CODE

Before the
Federal Communications Commission
Washington, D.C. 20054

FILED/ACCEPTED

DEC - 1 2006

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 04-409
Table of Allotments)	RM-11108
FM Broadcast Stations)	RM-11234
(Port Norris, New Jersey, Fruitland, and Willards,)	
Maryland, Chester, Lakeside, and Warsaw, Virginia))	

PETITION FOR RECONSIDERATION

Port Norris Radio ("PNR"), through counsel, hereby petitions the Commission for reconsideration of the *Report and Order*, released on October 13, 2006, in the above-captioned proceeding. As will be shown below, the staff's action in adopting the counterproposal advanced by CXR Holdings, Inc. ("CXR"), in lieu of the original proposal made by Dana J. Puopolo, is contrary to the public interest. The adopted CXR counterproposal does no more than permit CXR to move its WDYL(FM) from one community in the Richmond market to another community in the Richmond market and to upgrade from Class A to Class B1. By contrast, grant of the Puopolo proposal would have created a brand new allocation that would permit the provision of first local service to Port Norris, New Jersey, a community not located within any Urbanized Area and not located within any Arbitron market and would have increased the net number of stations providing service to the public. Because the Puopolo proposal better serves the intent of Section 307(b) of the Communications Act and the Commission's allotment priorities than does the CXR counterproposal, the staff should reverse the *Report and Order* and adopt the Puopolo proposal so that a new facility at Port Norris, New Jersey, can be established.

I. Background

On August 18, 2003, Dana J. Puopolo proposed that Channel 299A be allocated to Port Norris, New Jersey, as a new allotment. The requisite *Notice of Proposed Rulemaking* ("*NPRM*") was then issued by the Commission on November 5, 2004. The *NPRM* established a date of December 27, 2004, for the submission of comments and counterproposals. On that date, CXR submitted a counterproposal whereby its WDYL(FM) would change channel from Channel 266 to Channel 265; would change community of license from Chester, Virginia, to Lakeside, Virginia, which is another community located within the Richmond market; and would be upgraded to Class B1 status. Even though the proposed Channel 265 allocation is separated by more than 30 channels from the proposed Port Norris allotment, CXR crafted a mutual exclusivity with the Port Norris proposal by proposing that WNNT-FM, a station allocated to Warsaw, Virginia, move its operations from Channel 265A to Channel 298A. Curiously, however, CXR's engineering study did not assert that Channel 298A is the only channel to which WNNT-FM, which is located in the sparsely populated Northern Neck area of Virginia, can be reallocated, thus raising a question as to whether the CXR counterproposal is truly a counterproposal.

In a Public Notice issued on April 22, 2005, the Commission staff established May 9, 2005, as the date by which interested parties could submit comments with respect to the CXR counterproposal. PNR timely filed such comments.

In its comments, Port Norris explained that the CXR counterproposal would not achieve a preferential arrangement of allotments. Port Norris explained in particular that CXR's claim that it should be entitled to credit for providing first local service to Lakeside was without foundation inasmuch as Lakeside is a community that is inextricably intertwined with the Richmond market

and thus could not satisfy the criteria established by the Commission in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), to demonstrate that a community is truly independent of an Urbanized Area's central city. If a community proposed for an allotment is not independent of the central city, the proponent cannot receive credit for providing first local service to that community. See *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990). By contrast, the Port Norris proposal would serve the Commission's allotment priorities inasmuch as it would provide first local service both as a matter of law and as a matter of fact. Unlike Lakeside, Port Norris is not part of an Urbanized Area and is not a mere bedroom community in a larger market. Moreover, the Port Norris proposal, unlike the CXR proposal, would not merely result in a redistribution of currently-operating radio stations, but would permit the creation of a brand new facility.

In order to demonstrate that Lakeside is not, in fact, a community that is separate and apart from Richmond, PNR performed an analysis using the *Tuck* criteria. Application of those criteria clearly demonstrated that the CXR counterproposal should not be credited with providing first local service. As a result, when the FM allotment priorities were used to compare the original Puopolo Port Norris proposal with the CXR counterproposal, it became clear that the Port Norris proposal better served the public interest. The Port Norris proposal sought to provide first local service to a community of 1,507 persons, whereas, as originally submitted, the CXR counterproposal proposed first local service only to the community of Willards, Maryland, which is a community of only 938 persons. Thus, the original Port Norris proposal achieved a preferential arrangement of allotments.

Significantly, after all the pleadings had been submitted in this proceeding, CXR made a fundamental change to its counterproposal. It withdrew its proposal to provide first local service to Willards. As a result, CXR now finds itself with a proposal that no longer provides

cognizable first local service to any community. By contrast, of course, the Port Norris proposal seeks a new allocation for Port Norris. If there had been any doubt that the original Port Norris proposal was superior to the CXR counterproposal, that doubt was laid to rest once CXR withdrew that portion of its counterproposal that sought to provide first local service to Willards.

II. The Report and Order's Determination not to Perform a Tuck Analysis has Resulted in a Decision that is Contrary to Section 307(b) of the Communications Act and the Commission's Allotment Policies.

Despite the fact that the original Puopolo proposal would allow the residents of Port Norris to have a radio station of their own for the first time, the *Report and Order* adopted the CXR counterproposal rather than the Puopolo proposal. This decision is entirely founded on the faulty assumption that there was no need to consider whether Lakeside is a community that is so separate and apart from the Richmond Urbanized Area that a proponent seeking to allot a radio station to that community should be credited with providing first local service. The *Report and Order* concluded that it was unnecessary to consider Lakeside's independent status simply because WDYL's present community of license is also located within the Richmond Urbanized Area. This assessment, however, exalts form over substance. In adopting the rulemaking whereby licensees were permitted to modify their communities of license without subjecting themselves to competing applications, the Commission explained that, while it would generally apply the normal FM allotment priorities,¹ it would give "little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related

¹ The four allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters (with co-equal weight being given to priorities (2) and (3)). *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88, 91 (1982).

policies.”² CXR is engaging in precisely this type of artificial and technical manipulation of the Commission’s 307(b) policies. Both Chester and Lakeside are located within the Richmond Urbanized Area. Both communities are within the Richmond Arbitron market. As a result, WDYL is “home to” the Richmond Arbitron market and would continue to be “home to” the Richmond Arbitron market if it were reallocated to Lakeside. As PNR demonstrated in its comments with respect to the CXR counterproposal, Lakeside is inextricably intertwined with Richmond. Merely because a station is proposing to change its community of license from one community in a market to another community in the same market does not absolve the Commission staff of the responsibility for ensuring that its Section 307(b) criteria are not being gamed. That is especially true in the present case, where the proposed reallocation will not result in the provision of any additional transmission services but will, to the contrary, prevent a new transmission service from being established.

Indeed, the Commission staff itself has recognized that a *Tuck* analysis must be performed whenever a licensee proposes to change its community of license to a community located outside an Urbanized Area from which it would be able to provide city grade service over at least 50% of the Urbanized Area.³ In the present case, as PNR explained in its comments, the CXR counterproposal would create a situation in which WDYL would be increasing its coverage of the Richmond Urbanized Area from less than 50% to greater than 70%. Inasmuch as a rulemaking proponent that proposed to increase its coverage of an Urbanized Area from below 50% to greater than 70% by changing its community of license from one community of license outside the Urbanized Area to another community outside the Urbanized Area would be required to perform a *Tuck* analysis, it simply makes no sense to

² *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, Memorandum Opinion and Order on Reconsideration*, 5 FCC Rcd. 7094, 7096 (1990).

³ *See Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995).

exempt a proponent from the requirement to perform a *Tuck* analysis simply because both its current and proposed communities are located within the Urbanized Area. Indeed, one of the factors that has traditionally been used by the Commission in determining whether a proponent is truly entitled to credit for providing first local service is the proximity of the proposed community of license to the central city of the Urbanized Area.⁴ Thus, if anything, a proponent that is proposing to relocate its community of license from one community in the Urbanized Area to another community in the Urbanized Area should be subjected to a more stringent *Tuck* analysis than a proponent that is merely proposing to establish a community of license outside the Urbanized Area inasmuch as the very fact that a proposed community of license is within an Urbanized Area means that it necessarily has a geographic and social interdependence with the central city of the Urbanized Area that requires further examination. To automatically grant credit for first local service to a proponent simply because the community it is abandoning is located within the Urbanized Area is to turn the Commission's allocation criteria into an empty formality. The *Tuck* decision itself clearly explained that no 307(b) credit is to be awarded for the provision of local service to communities that are dependent upon the central city inasmuch as, in such situations, the entire metropolitan area is to be treated as one community.⁵ Unless a *Tuck* analysis is performed, the Commission has no way of knowing whether the proposed community is so intertwined with the central city that no credit for first local service can be awarded. That being the case, the *Report and Order's* conclusion that no *Tuck* analysis was required in the case of the CXR counterproposal was nonsensical.

Once the *Tuck* criteria are applied to Lakeside, it becomes clear that CXR should not be entitled to first local service credit as a result of its proposal to change its community of license

⁴ The proximity of the proposed community of license to the central city is one of the factors that the *Tuck* decision itself finds to be of significance. See *Tuck*, 3 FCC Rcd at 5377.

⁵ 3 FCC Rcd at 5376.

to Lakeside. As was demonstrated by PNR in its comments, application of those criteria clearly demonstrate that Lakeside is dependent on the Richmond Urbanized Area. Lakeside has no dedicated media outlets. It is served instead by the dozens of radio and television stations located within the Richmond Urbanized Area. The local newspapers serving Lakeside are Henrico County weekly papers or Richmond daily papers. Lakeside has no locally elected government. It relies upon government services provided by Henrico County. The public elementary school is part of the Henrico County public school district. Public library services are provided by the county. Public safety services are provided by the county. Lakeside does not have its own telephone book. Instead, listings are placed in the Richmond telephone book. There are a limited number of commercial establishments compared to the number of establishments available in the Richmond Urbanized Area. The medical facilities in Lakeside are limited and residents must travel to Richmond or another neighboring community to reach a hospital or large treatment center.

In short, even if the CXR counterproposal can be truly considered a counterproposal to the Port Norris proposal,⁶ that counterproposal is markedly inferior to the original Port Norris proposal. Now that CXR has modified its counterproposal, it proposes no cognizable first local service. By contrast, the original Port Norris proposal proposes first local service to Port Norris, a community that not only currently has no local transmission facility of its own, but that is located outside of any Urbanized Area or any Arbitron market. Given the fact that the purpose of Section 307(b) of the Communications Act is to ensure that there is a fair, efficient and equitable allocation of radio service among the various communities in the country, the *Report*


⁶ As has been noted above, CXR never demonstrated that Channel 298 was the only available channel to which WNNT-FM could be relocated.

and Order's determination to adopt the CXR counterproposal and to deny the Port Norris proposal is contrary to Section 307(b)'s intent.

As a result, the *Report and Order* must be reversed.

Respectfully submitted,

PORT NORRIS RADIO

By: 
M. Elizabeth Ritter
Its Attorney

Ms. Elizabeth Ritter,
Attorney at Law
2346 S. Douglas Road
Coral Gables, Florida 33134-5304

Telephone: (305) 893-6344
Fax: (305) 661-0602

December 1, 2006

CERTIFICATE OF SERVICE

I, M. Elizabeth Ritter, do hereby certify that copies of the foregoing Petition for Reconsideration were sent this 1st day of December, 2006, by first class U.S. Mail, postage prepaid, to the following:

Marlene Dortch*
Secretary
Federal Communications Commission
445 Twelfth Street, SW
TW-A325
Washington, DC 20554

Victoria McCauley
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dana J. Puopolo
2134 Oak Street
Unit C
Santa Monica, CA 90405

John M. Pelkey
Garvey Schubert Barer
1000 Potomac Street, N.W.
5th Floor
Washington, D.C. 20007
(Counsel to MainQuad Communications, Inc.)

The Popular Assembly of New Horizons
Leo Ashcraft
1511 South Jefferson Ave.
Mount Pleasant, TX 75455

Mark J. Prak
Brooks, Pierce, McLendon
150 Fayetteville Street Mall
Suite 1600
Raleigh, NC 27601
(Counsel to Northern Neck & Tidewater Communications, Inc.)

Lee J. Peltzman
Shainis & Peltzman
1850 M Street, N.W., Suite 240
Washington, D.C. 20036
(Counsel to Maranatha, Inc.)

Dennis P. Corbett
Leventhal Senter & Lerman PLLC
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(Counsel to Great Scott Broadcasting)

Kevin F. Reed
Dow Lohnes & Albertson, PLLC
1200 New York Avenue, NW
Suite 800
Washington, D.C. 20036-6802
(Counsel to CXR Holdings, Inc.)

Mark N. Lipp
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel to CXR Holdings, Inc.)


M. Elizabeth Ritter

*VIA HAND DELIVERY